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No.

Supreme Court, U. S.
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In the
Supreme Court of the United States
OCTOBER TERM, 1979

LEO MIROFF and
JANE FRANCES POWERS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioners respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on October 1, 1979, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the Petitioner Miroff guilty of conspiracy to transport stolen property in interstate commerce in violation of 18 U.S.C. §371 and finding both petitioners guilty of transporting stolen property in interstate commerce in violation of 18 U.S.C. §§2314 and 2(b). Miroff

was sentenced to the custody of the Attorney General of the United States for a period of one year to be followed by probation for a period of three years. Powers was sentenced to the custody of the Attorney General for a period of six months to be followed by probation for a period of four and one half years.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on August 30, 1978, without opinion and is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court, filed on October 1, 1979, No. 78-2174, is set forth in the Appendix and reported at 606 F.2d 777.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was filed on October 1, 1979, and a timely petition for rehearing was denied on December 5, 1979. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Does a host's consent to search a bedroom occupied by guests extend to a search of receptacles containing personal belongings of the non-consenting guests where the searching officers are advised that everything in the searched room belongs to the non-consenting guests prior to the search?
2. Did the court below err in admitting evidence relating to criminal activity not charged in the indictment where knowledge and intent were not in issue and where the other criminal activity took place subsequent to the substantive offense charged in the indictment?
3. Did the court below err in admitting testimony relating to guns found in the bedroom occupied by the petitioners?
4. Did the denial of petitioners' motions for a mistrial deprive them of their rights to receive a fair trial pursuant to the Due Process clause of the Fifth Amendment?

STATEMENT OF THE CASE

The petitioners were charged in a two count indictment returned by the Grand Jury on June 30, 1977. Count One of the indictment charged both petitioners with conspiracy to transport stolen property in interstate commerce in violation of Title 18, United States Code, Section 371. Count Two charged both petitioners with the offense of transporting stolen property in interstate commerce on January 12, 1973 in violation of Title 18, United States Code, Sections 2314 and 2(b).

Miroff was convicted by a jury of both counts while Powers was convicted only of Count Two on July 28, 1978.

The trial evidence showed that early in January, 1973, Louis Almeida and Leonard Foresta met with Harry Aleman, unindicted co-conspirators, in Chicago, Illinois, (T.[1]20) and Aleman told them about a plan to rob the

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[1]. "T" refers to the Transcript of Proceedings of the trial court.

[2]. "T.S." refers to the Transcript of Proceedings of the hearing held on petitioner's motion to suppress in the trial court.

home of Dr. Robert Messinger in Indianapolis, Indiana. The tip on the home invasion was supplied by petitioner Miroff (T.22).

The next day Almeida and Foresta drove to Miroff's apartment in Indianapolis, Indiana (T.27) where they also met petitioner Powers, who was Miroff's girlfriend (T.34).

After having dinner, Miroff drove them by Dr. Messinger's home (T.38).

On the morning of the robbery, January 11, 1973, the four of them drove to a shopping plaza (T.43). Almeida and Foresta went in one car while the petitioners went in Miroff's car. The petitioners waited at the shopping plaza while Almeida and Foresta went to commit the robbery at the Messinger home which was about a mile from the shopping plaza (T.44).

After committing the robbery, Almeida and Foresta drove back to the shipping plaza where the petitioners were waiting, and the four then went back to Miroff's apartment (T.55).

Early in the morning following the robbery the four left Indianapolis (T.57). Almeida drove back with Miroff in his car, and Foresta and Powers drove back in Foresta's car (T.58). The furs and jewelry were in the car with Foresta and Powers. Foresta wanted her to ride with him so that in the event they were stopped by the police, Powers could say that the furs and jewelry were hers.

Upon arriving in the Chicago area, they all went to Aleman's house in Melrose Park.

On January 26, 1973, Melrose Park police officers and federal narcotic agents went to the residence of Robert Harder, 581 Caldwell Lane, Hoffman Estates, Illinois to

execute arrest warrants for Harder and the petitioners for an offense that was not the subject of this indictment (T.188).

A bedroom occupied by the petitioners on the main floor of the house was searched (T.190). Some portable radios and shavers were found inside some shopping bags (T.191). Four fur pieces and a fur hat were found in a closet inside a garbage type bag. On the inside of the fur pieces was a name "Jody Messinger" and a label that said, "L.S. Ayres, Indianapolis, Indiana" (T.192).

Two guns, $980 in $20 bills and some jewelry were found in a garment bag in a closet. Some papers with writings were found on a night stand next to the bed. Two Indiana license plates and one set of Illinois plates were found on the floor of the closet in the bedroom (T.193).

A handwriting expert identified the writings found in the bedroom as being written by the petitioners (T.278).

REASONS FOR GRANTING THE WRIT

1. A Host's Consent To Search A Bedroom Occupied By Guests Does Not Extend To A Search Of Receptacles Containing Personal Belongings Of The Non-Consenting Guests Where The Searching Officers Are Advised That Everything In The Searched Room Belongs To The Non-Consenting Guests Prior To The Search.

Prior to trial, the petitioners filed a motion to suppress as evidence all items taken by law enforcement officers from the bedroom occupied by them at the Harder residence, 581 Caldwell Lane, Hoffman Estates, Illinois, on January 26, 1973 (R.9). After an evidentiary hearing, the trial judge denied the motion (R.29).

On January 26, 1973, several federal agents and police officers of the Melrose Park Police Department went to the Harder residence with arrest warrants for the petitioners and Robert Harder charging them with possession of stolen radios (T.S.20).

Although the petitioners were arrested in the entry way of the house (T.S.20), a bedroom occupied by them and located a few steps off the ground floor of the house was searched (T.S.22). The officers went into the bedroom to look for small portable radios, Norelco shavers and television sets that were allegedly taken in a Melrose Park burglary (T.S.23).

Prior to the search, Mr. Harder told the officers that everything in the bedroom belonged to the petitioners (T.S.23).

When Federal Agent Tucci told Harder that he had seen stolen radios in the house, Harder told Tucci that he would not allow stolen property in his residence and that Tucci had "full permission to search his residence" (T.S.76).

The jewelry, two guns and some cash were found in a closed garment bag hanging in the closet of the bedroom (T.S.25, 26). Some furs were found in a plastic garbage type bag lying on the floor of the closet. License plates were found either in the garment bag or on the floor of the closet. An address book and slips of paper with a description of the jewelry were found on top of a night stand in the bedroom (T.S.28). In the lining of the furs was the name of "Jodie Messinger" and a department store label (T.S.47).

At the time of the seizure of these items, the officers did not know that the furs, cash and jewelry had been stolen (T.S.30).

The ruling of the court below is in conflict with decisions of other circuits.

A case with a factual situation very similar to that of the case at bar is *United States* v. *Wilson,* (9th Cir. 1976) 536 F.2d 883. In this case, Sharon McKee gave F.B.I. Agents consent to search her apartment. She told the agents that the three suitcases found by them were not hers and that they had been left by visitors the night before.

In its ruling, the court stated at pages 884-885:

> "Although McKee could effectively consent to the agents' search of her apartment, she had neither actual nor apparent authority to consent to the suitcase searches. She disclaimed any ownership of or

> possessory interest in them. She had neither the 'common authority' over nor the 'mutual use' of the suitcases that could give constitutional validity to her consent. (*United States* v. *Matlock*, (1974) 415 U.S. 164, 171 & n.7, 94 S.Ct. 988, 39 L.Ed.2d 242; See *Corngold* v. *United States*, (9th Cir. 1966) 367 F.2d 1, 6-8)"

Likewise, in the case at bar, Mr. Harder, who gave the officers consent to search his house, disclaimed any ownership or possessory interest in the articles seized in the bedroom occupied by the petitioners. He told the officers that whatever was in the bedroom belonged to the petitioners (T.S.23).

The petitioners had a reasonable expectation of privacy with respect to the garment bag and other bags containing the items seized by the officers, and they did nothing to bring an end to their right of privacy insofar as the contents of the containers in question. The right of the officers to search the petitioners' containers must rest upon a showing that the petitioners waived their personal right of privacy by word or deed, either directly or through an agent. No such showing was made in the case at bar. See *Corngold* v. *United States*, (9th Cir. 1966) 367 F.2d 1, 6-8.

Although Harder, as owner of the house, may have had authority to consent to a search of the bedroom premises, this authority would not extend to a search of the interior of the garment and plastic bags found in the bedroom. Since Harder had previously told the searching officers that whatever was in the bedroom belonged to the petitioners, they were aware of the fact that these items belonged to the petitioners and not the Harders at the time of the search.

A Fourth Circuit case is also in conflict with the ruling of the court below.

In *United States* v. *Block*, 590 F.2d 535 (4th Cir. 1978), the court held that the defendant's mother's consent to search her son's room did not extend to a search of a footlocker in the room. The defendant was a mere guest occupant in his mother's home. In reversing the defendant's conviction the Fourth Circuit stated:

> "On the facts found and those not disputed, Block was a mere guest occupant of the room in his mother's home, and the mother had the normal free access that heads of household commonly exercise in respect of the rooms of family member occupants. She therefore clearly had authority to permit inspection of this room. United States v. Peterson, 524 F.2d 167 (4th Cir. 1975). Put in terms of the controlling principles above summarized, she shared access to the room, as room, under circumstances that made it reasonable for the police to believe that she had a right to permit its inspection, and that her son must have assumed the risk that she would do so. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed. 2d 242 (1974); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975). As plain as this appears, it is equally plain that, within these principles, her authority did not extend to the interior of the footlocker within the room; and that of course is the decisive point here. While authority to consent to search of a general area must obviously extend to most objects in plain view within the area, it cannot be thought automatically to extend to the interiors of every discrete enclosed space capable of search within the area. The decided cases indicate precisely the contrary: that each such enclosed space stands on its own bottom for this purpose. See e.g., United States v. Wilson, 536 F.2d 883 (9th Cir. 1976)

(suitcase in consenter's apartment); Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955) (cabinets in consenter's home); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) (employee's desk in consenter's office suite). See also United States v. Poole, 307 F.Supp. 1185 (E.D.La. 1969) (overnight bag in consenter's apartment closet; consent ineffective although given in victim's presence).

This is as it must be for the protection of one of the primary objects of people's ordinary expectations of privacy. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Common experience of life, clearly a factor in assessing the existence and the reasonableness of privacy expectations, surely teaches all of us that the law's 'enclosed spaces' — mankind's valises, suitcases, footlockers, strong boxes, etc. — are frequently the objects of his highest privacy expectations and that the expectations may well be at their most intense when such effects are deposited temporarily or kept semi-permanently in public places or in places under the general control of another. Indeed, to the sojourner in our midst — all of us at one time or another — the suitcase or trunk may well constitute practically the sole repository of such expectations of privacy as are had." 590 F.2d at page 541.

The Second Circuit has also ruled contrary to the opinion of the court below in this cause.

In the case of *United States* v. *Isom*, 588 F.2d 858 (2d Cir. 1978), the court sustained the warrantless search and seizure of a locked box found under the bed in the room occupied by the defendant as a tenant because the defendant did not claim the box as his own. However, in its opinion, the Second Circuit also said the following which is applicable to the case at bar:

"A troublesome issue, however, remains. Although it is sufficiently clear that Ames consented to the search of the premises with authority to do so, it is less clear that she had authority to consent to the forcible opening of the locked metal box, found under the bed, which contained several weapons. If that box belonged to appellant, then he had a colorable Fourth Amendment interest in keeping its contents private, even though he was only a guest in her apartment. Cf. United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (warrantless search of footlocker forbidden absent exigent circumstances, even though police seized locker and arrested defendants in public place); United States v. Pravato, 505 F.2d 703 (2d Cir. 1974) (leaving open question whether third party's consent to search of room carries with it consent to search defendant's suitcase). Guests have a justifiable expectation under Katz v. United States, 389 U.S. 347, 83 S.Ct. 507, 19 L.Ed.2d 576 (1967), that the contents of locked articles that they bring to the host's premises will remain private. This justifiable expectation should not be vitiated by a strained application of the third-party consent doctrine; the consent of the host should ordinarily be insufficient to justify a warrantless search when it is obvious that the searched item is the exclusive property of the guest. If the police wish to search such an article, then under Chadwick, supra, they may seize it upon probable cause, which they surely had here once the sawed-off shotgun was discovered in the pillow; they may then search the box after they have obtained a warrant." 588 F.2d at page 861.

In holding that the petitioners in the instant cause waived their expectations of privacy by assuring their hosts that there were no stolen goods in the bedroom, the court below vitiated their justifiable expectation of privacy "by a strained application of the third-party consent doctrine."

Reliance by the court below on this court's decision in *Frazier* v. *Cupp,* 394 U.S. 731; 89 S.Ct. 1420 (1969) wherein it was stated that the court would not engage in metaphysical subtleties in judging the efficacy of such a consent is misplaced. In *Frazier*, the searched duffel bag was being used jointly by the defendant and the person who gave the consent. In the case at bar, this court is not required to engage in "metaphysical subtleties" because the officers conducting the search were told at the time of the consent that everything in the room belonged to the petitioners. Furthermore, although there may have been joint use of the premises searched in the case at bar, there definitely was not joint use of the "enclosed spaces" searched.

The petitioners' motion to suppress should have also been sustained for the reason that the seizure was made without probable cause. At the time of the seizure of the jewelry, license plates, cash, furs and guns the officers had no knowledge whatsoever that any of these items were in fact stolen nor does the record reveal any facts that would permit their seizure pursuant to any exceptions to the warrant requirements of the Fourth Amendment. See *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971), *Aguilar* v. *Texas,* 378 U.S. 108, 84 S.Ct. 1509, *Spinelli* v. *United States,* 393 U.S. 410, 89 S.Ct. 584, *United States* v. *Chadwick,* 433 U.S. 1, 97 S.Ct. 2476.

Wherefore, the complained of search and seizure were violative of the petitioners' rights pursuant to the Fourth Amendment to the Constitution, and the fruits of this search should have been suppressed.

2. The Court Erred In Admitting Evidence Relating To Criminal Activity Not Charged In The Indictment.

A. Knowledge And Intent Were Not In Issue.

The ruling of the court below that the testimony regarding conversations with Agent Tucci about stolen radios and with regard to the officers going to the Harder residence to make arrests in connection with those radios was admissible on the theory that it bore on the knowledge and the intent of the petitioners insofar as the items taken from the Indianapolis house is in conflict with decisions of other circuits.

In the case at bar, the petitioners did not testify nor did they present any evidence to affirmatively contest their intent and knowledge that the jewelry, cash and furs were stolen. By having pled not guilty the petitioners were merely denying having committed the crimes charged in the indictment. Their defense did not consist of any evidence to the effect that the acts performed by them were done innocently, by mistake or without knowledge that the items were stolen. Therefore, knowledge and intent were not in issue in the instant case; and the evidence of other criminal activity should not have been admitted.

In *United States* v. *Adams,* (2d Cir. 1967) 385 F.2d 548, the defendant was convicted of selling cocaine to a narcotics agent. During the agent's testimony he also testified relating to conversations of a possible heroin transaction which never transpired. In commenting upon this evidence the Second Circuit stated:

> " . . . The agent to whom Adams allegedly sold the cocaine testified about conversations concerning a possible transaction in heroin that never transpired. The Government claims this was proper within such recent

decisions as United States v. Bozza, 365 F.2d 206, 214 (2 Cir. 1966) and United States v. Deaton, 381 F.2d 114 (2 Cir. 1967), since it gave the whole story of the agent's dealings with Adams. While these decisions rejected a wooden application of the 'other crimes' rule, the Government should not press them too far. Far from being an essential part of the story of his dealings with Adams for cocaine, the agent's testimony as to the proposed heroin transaction had to be specially elicited from him after his recollection of the initial conversation had been temporarily exhausted; moreover there is a rather clear distinction between transactions that occurred, as in *Bozza* and *Deaton,* and one that did not. The evidential value of the latter is principally in showing the accused's state of mind; proof of this might better be deferred until the defense case makes it necessary to develop evidence of other crimes for that purpose. See United States v. Byrd, 352 F.2d 570, 575 (2 Cir. 1965)". 385 F.2d at page 551

Although it is proper to establish criminal intent and knowledge by evidence of other criminal activity, such evidence is inadmissible to establish criminal intent or knowledge unless and until the defendants have affirmatively contested their intent and knowledge that the articles which are the subject of the indictment were stolen. See *United States* v. *Miller,* 508 F.2d 444 (7th Cir. 1974).

In *United States* v. *Broadway,* 477 F.2d 991, 994-995 (5th Cir. 1973) the Fifth Circuit stated:

> " . . . other crime evidence may be received only if the elements of the offense which the evidence is introduced to establish is contested, Lovely v. United States, 4 Cir. 1948, 169 F.2d 386, cert. denied, 1949, 338 U.S. 834, 70 S.Ct. 38, 94 L.Ed. 508, and is not established by other uncontroverted evidence relating to the principal offense, United States v. Byrd, 2 Cir. 1965, 352 F.2d 570, 574."

The *Broadway* opinion also said that an independent preliminary examination of the proffered evidence of other criminal activity out of the jury's presence should be conducted to determine its admissibility. This procedure was also suggested by the Seventh Circuit in *United States* v. *Fearns,* 501 F.2d 486, 490 (7th Cir. 1974).

See also the Seventh Circuit's opinion in *United States* v. *Fierson,* 419 F.2d 1020 (7th Cir. 1969) wherein it was stated at pages 1022-1023:

> "In order to be admissible as bearing upon wilfulness and intent, evidence that the accused has committed prior criminal acts must first be shown to be similar to the offense charged and close enough in time to be relevant. In this case, the reported previous criminal act was identical in type to the offense charged, and on the question of proximity in time, we cannot say that the passage of eleven months from the date of the prior criminal act to the date of the offense alleged in the indictment was, in itself, sufficient to require exclusion. See Whaley v. United States, supra.
>
> More than this, however, is required. Obviously intent must be an element of the offense to justify the admission of this type of evidence. Prior criminal acts cannot be proved to show intent when intent is not an element of the offense charged. United States v. Menk, supra. Equally obvious is the fact that when intent is a material element of the offense, it is part of the prosecuting attorney's case to be proved in chief lest he find himself out of court at the close of his evidence.
>
> However, to justify admission into evidence of an accused's prior criminal acts to establish willfulness and intent, it is necessary that willfulness and intent be more than merely formal issues in the sense that the defendant is entitled to an instruction thereon,

See United States v. Magee, supra. When, as in this case, the government has ample evidence to take the case to the trier of fact for its deliberation, a plea of not guilty cannot, by itself, be construed as raising such a keen dispute on the issue of willfulness and intent so as to justify admission of this type of evidence. See United States v. Magee, supra."

B. Intent And Knowledge Cannot Be Shown By Proof Of Subsequent Criminal Activity.

The indictment in this cause charged the petitioners with the crimes of conspiracy to transport goods in interstate commerce and the substantive offense of transporting stolen goods in interstate commerce. The evidence showed that the actual transportation from Indianapolis took place on January 12, 1973. The evidence of other criminal activity took place on January 19, 1973, when the petitioner Miroff in the presence of petitioner Powers discussed the possible sale of stolen articles to Agent Tucci. Their arrest for possession of these stolen articles took place on January 26, 1973.

The ruling of the court below that such evidence of subsequent criminal activity was admissible to show knowledge is contrary to decisions of other circuits.

In the case of *United States* v. *Boyd*, 595 F.2d 120, 126 (3d Cir. 1978), the Third Circuit stated that "[T]he logic of showing prior intent or knowledge by proof of subsequent activity escapes us."

In *Boyd,* the defendants were convicted of conspiracy and substantive offenses relating to the manufacture and distribution of controlled substances. The court admitted the testimony of an undercover officer (Goff) that on three days after the expiration of the conspiracy charged

in the indictment, he had a discussion with one of the defendants about the purchase of a controlled substance and about two months later, he had a similar discussion with one of the other defendants.

In holding that the admission of such testimony was erroneous, the Third Circuit stated:

> ". . . Had Goff's testimony established, for example, possession of the fruits of the prior illegal manufacturing operation, it might well have been admissible under the subsequent possession authorities. But on this record Goff's testimony was other crimes evidence pure and simple. It was not materially different from an attempt to prove a robbery in August by evidence of an unrelated robbery in January. *It was relevant only if the jury could have drawn the inference that the subsequent crime evidenced a prior propensity toward criminal activity, and that, of course, is the one inference that other crimes evidence may not be admitted to support. The admission of Goff's testimony was thus reversible error.*" 595 F.2d at 127 (Emphasis Added)

See also *United States* v. *Silva,* 580 F.2d 144 (5th Cir. 1978) which held that evidence as to negotiation for sale of heroin subsequent to the transaction for which defendant was charged was not admissible to show criminal intent. The Fifth Circuit in *Silva* went on to say:

> "The first arguably applicable exception, involves 'knowledge and intent.' According to the government, the testimony at trial was properly admitted on the grounds that evidence of the other offenses was admissible to show criminal intent. See Fed.R.Evid. 404(b). The law is, however, that before an exception to the general rule excluding evidence as to other crimes can be invoked, the trial court must be satisfied that several prerequisites have been met:

(1) there is plain, clear and convincing evidence of a similar offense, (2) the offense is not too remote in time, (3) the element of the prior crime for which there is a recognized exception must be a material issue in the case, (4) there is a substantial need for the probative value of the evidence. See United States v. San Martin, 505 F.2d 918 (5th Cir. 1974). The danger of the prejudicial effect of similar offenses is such that all of these prerequisites must be met before the evidence is admitted. United States v. Goodwin, 492 F.2d 1141, 1150 (5th Cir. 1974).

Applying this test to the present case, the testimoney concerning the appellant's subsequent acts clearly fails to meet the third prerequisite and therefore should not have been admitted. In determining that intent was never a material issue, we are guided by the proposition that the materiality of intent depends, not on the statutory definition of the offense, but on the circumstances of the case and on the nature of the defense. United States v. Adderly, 529 F.2d 1178, 1181 (5th Cir. 1976). In the present case the defendant's sole defense was that of mistaken identity. This court has acknowledged in Adderly, supra at 1181, that a defendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred." 580 F.2d 144 at page 148.

See also the case of *United States* v. *O'Connor,* 580 F.2d 38 (2d Cir. 1978), wherein the Second Circuit stated at page 43:

> "We therefore hold that the other crimes testimony should have been excluded. It was not relevant to a significant issue that was truly in dispute and was therefore inadmissible under Rule 404(b). Not only was the evidence irrelevant, it was prejudicial because it might lead a jury to convict because it thought the defendant's character was such that he frequently committed crimes. Moreover, the evidence distorted the emphasis at trial away from the crimes covered by the indictment to those not so charged. On these facts, the evidence should have been excluded. We do not suggest that evidence of other crimes cannot be used; our own precedents and Rule 404(b) are to the contrary. But caution and judgment are called for, and a trial judge faced with an other crimes evidence problem should require the Government to explain why the evidence is relevant and necessary."

See also the case of *United States* v. *Manafzadeh,* 592 F.2d 81 (2d Cir. 1979), wherein the defendant was convicted of the crime of transporting falsely made checks in interstate commerce. The defendant's defense was that he had nothing to do with the creation of the fraudulent checks that were the subject of the indictment. In ruling that the admission of subsequent other crime evidence was erroneous, the Second Circuit stated at page 89:

> "Even if the February other-act evidence is admissible as an admission but not as other-crimes evidence pursuant to Fed.R.Evid. 404(b), there is no doubt that the admission of the May subsequent act evidence was erroneous and highly prejudicial to the defendant. *It served to direct the jury's attention away from the offenses charged to a crime not charged which was not relevant to any issue in contention at trial, thus giving the jury the opportunity to draw the impermissible inference that because the defendant apparently acted unlawfully on a much later occasion and in a different way, he must have committed the earlier unlawful acts alleged in the present case.* United States v. O'Connor, supra, 580 F.2d at 43; United States v. Gubelman, supra, 571

F.2d at 1256-57 (Mansfield, J., dissenting). That is precisely the inference Fed.R.Evid. 404(b) was designed to prevent. The May subsequent other-crime evidence therefore should have been excluded, and its admission requires reversal of the conviction." (Emphasis Added)

The case of *United States* v. *Parnell,* 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied,* 98 S.Ct. 852, cited by the court below in its opinion is not applicable because the earlier crime admitted in the *Parnell* case was the "direct precursor to the scheme for which the appellants were brought to trial. The conspiracy charged in the indictment grew out of and was a refinement upon the earlier operation."

However, in the case at bar, the other crime testimony had no relation whatsoever to the crimes charged in the indictment.

3. The Court Erred In Admitting Testimony Relating To Guns Found In The Bedroom Occupied By The Petitioners.

Despite the objection of the petitioners, a police officer was permitted to testify that two guns were found during the search of the room occupied by the petitioners at the Harder residence. (T.192). The petitioners' motion for a mistrial based upon the improper admission of this testimony was also denied by the trial judge.

Notwithstanding the fact that it was stipulated that these two guns were not the ones used in the invasion of the Messinger home (T.351), this evidence certainly was not relevant or material to any of the issues involved in the instant indictment. Therefore, the only purpose

served by the admission of this testimony was to create an impression in the minds of the jury that the petitioners were evil persons who would use guns, if necessary, to carry out their evil intents. This would be especially true in the case of Petitioner Powers about whom the jury had already been informed that she had shot her husband (T.35).

Even though ownership of the guns was never proved by the prosecution, there was an innuendo that they belonged to either one or the other of the petitioners since they were found in a bedroom jointly occupied by them.

In the case of *Moody* v. *United States,* (9th Cir. 1967) 376 F.2d 525, the defendant's narcotic conviction was reversed because of improper testimony relating to a loaded revolver found in the glove compartment of the defendant's automobile. In reversing the conviction the Ninth Circuit stated:

> "The presence of the loaded revolver could only be regarded by the jury as indicating that the appellant was a bad man engaged in criminal enterprise, who might shoot anybody who attempted to frustrate the illegal importation of heroin, although in the circumstances of this case the presence of the loaded gun was not relevant to any matter which the jury was called upon to decide." 376 F.2d at 532.

See also the case of *United States* v. *Robinson,* (2d Cir. 1976), 544 F.2d 611, wherein the Second Circuit stated at pages 618-619:

> "When a person is found with a gun in his possession in an urban area such as New York City, many persons might conclude that the gun was being carried

in order to commit violent crimes. When, as in this case, the person found with a gun is then singled out by the police and prosecutors, by virtue of his prosecution, as one who is likely to use a gun for an unlawful purpose, a far larger number would conclude that the possessor of the gun is a dangerous person who ought to be segregated from society. Judge Bryan's limiting instruction, note 5 supra, was far too cryptic to dispel the possibility of severely unfair prejudice here. In view of the gun evidence's marginal probative value, we conclude that its admission constituted error."

In the case of *United States* v. *Warledo,* (10th Cir. 1977), 557 F.2d 721, the Tenth Circuit, in reversing the defendant's conviction for erring in receiving in evidence a rifle, stated as follows:

"Mainly because the rifle was unrelated to any issue in the case and due also to the fact that it was inherently prejudicial, we are of the opinion that the court erred in receiving it.

• • •

It is not possible to justify the receipt in evidence of this rifle on the basis of its being relevant.

• • •

The courts have quite uniformly condemned the introduction in evidence of testimony concerning dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged. The Seventh Circuit so held in *United States* v. *Reid,* 410 F.2d 1223, 1226-27 (1969), citing *Thomas* v. *United States,* 376 F.2d 564 (5th Cir. 1967); *Moody* v. *United States,* 376 F.2d 525, 532 (9th Cir. 1967); and *Brubaker* v. *United States,* 183 F.2d 894, 898 (6th Cir. 1960). The court added that it is only where there is an independent evidentiary basis to tie to the use of a weapon, that is the use of the weapon to commit the crime, that the introduction of such evidence is permissible. *Reid, supra* citing *United States* v. *Blackburn,* 389 F.2d 93, 95-97 (6th Cir. 1968). There has been no attempt to show that the A.R. 15 related to any of the counts charged."

The guns in the case at bar would not be admissible under this theory since it was stipulated that they were of a different type than the ones used by Almeida and Foresta.

The Seventh Circuit has also condemned the use of testimony concerning dangerous weapons found among the belongings of a person accused of a crime. See *United States* v. *Reid,* (7th Cir. 1969) 410 F.2d 1223, wherein it was said:

"... The introduction of testimony concerning dangerous weapons found among the belongings of a person charged with a crime, no part of which depends upon the use or ownership of the weapon, has consistently been regarded as prejudicial error requiring a new trial. Thomas v. United States, 376 F.2d 564, 567 (5th Cir. 1967); Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967); Brubaker v. United States, 183 F.2d 894, 898 (6th Cir. 1950). Only where there is independent evidence tending to relate the use of the weapon to the commission of the offense has the introduction of such evidence been permitted. United States v. Blackburn, 389 F.2d 93, 95-97. (6th Cir. 1968). We hold that this evidence was unduly prejudicial and inflammatory and that no reference to it may be permitted at the next trial." 410 F.2d at pages 1226-1227.

See the concurring opinion of the Seventh Circuit in *United States* v. *Bell,* 498 F.2d 887 (7th Cir. 1974) wherein it was stated at page 889:

> "I wish however to emphasize that had Agent Loehr testified that he retrieved a weapon from defendant's waistband, such testimony would have been wholly prejudicial and a cautionary instruction to the jury would not have adequately cured the error."

4. The Denial Of Petitioners' Motion For A Mistrial Deprived Them Of Their Due Process Rights To Receive A Fair Trial.

On several occasions during the course of the trial, Government witnesses testified to matters which were stricken by the Court. However, because of the highly prejudicial nature of the testimony, such a strong impression had probably been made on the minds of the jurors that a mere sustaining of the objection and striking of the answer was not sufficient to wipe out the harmful effects of the improper testimony.

During the direct examination of Government witness Louis Almeida the following colloquy took place:

> "Q. Did you have a conversation with him (Leonard Foresta) in the car on your way to Indianapolis?
> A. Yes, sir.
>
> Q. What did he tell you about Leo Miroff?
> A. He told me that Leo Miroff used to give him tips on scores to make." (T.31)

The court sustained the petitioner's objection and struck the answer, but a motion for a mistrial was denied (T.33).

Later in the direct testimony of Almeida, the following occurred:

> "Q. . . . Did Mr. Miroff speak with you at that time in January about Jane? (Petitioner Jane Powers)
> A. Yes, sir.
>
> Q. What did he tell you about her?
> A. He told us that we had nothing to worry about, that we could feel free to talk in front of her, that she was a standup broad and that she shot her husband, something like that." (T.35)

Petitioner's objection was sustained (T.35) but a motion for a mistrial was denied (T.80). In denying the mistrial motion, the court observed:

> "The Court: Well, as I recall, you didn't attempt to ask any leading question on that particular occasion, and it is that particular occasion that we are concerned about. All right. The motion for a mistrial is denied; although I do say:
>
> I am very disappointed that that happened. I'm going to continue because I believe that the way this thing is shaping up, this is not going to be a case so close that — so close to the evidence that that particular kind of thing is going to effect the balance, but —
>
> Mr. Rotenberg: Well, has your Honor pre-judged it after having heard only one witness?
>
> The Court: No, but I have heard the evidence on the motion to suppress, and I know that the evidence here is going to be very strong. But I will take a different view of the matter if that turns out to be an incorrect prediction. In a close case, I think that kind of statement by a witness could well be reversible error." (T.80)

During the direct examination of William Erickson of the Chicago Police Department who was called as a government witness, the following colloquy took place (T.266-267):

"A. I'm an investigator with the Central Investigations Unit.

Q. And approximately how long have you been with Central Investigations?

A. Approximately seven years.

Q. *And, sir, could you tell us what are your duties as a person assigned to the Central — what was it? — Intelligence?*

A. *Central Investigations Unit. Our responsibility is with the known thieves, professional thieves.*

Mr. Rotenberg: Objection, your Honor.

The Court: Yes, sustained. That'll be stricken.

By Mr. Fleischmann:

Q. Can you tell us whether or not you conduct any surveillances?

A. That's our main — that's our main duties in Central Investigations Unit, mainly surveillances.

Q. Sir, I would direct your attention to January 30, 1973, and at approximately 12:45 p.m., could you tell us where you were at that time?

A. Yes. Approximately at 12:45, I was out in Schiller Park, and I had just entered a restaurant, 9501 West Irving Park — it's called the 9501 Club, I believe — to have lunch.

Q. And did you observe anyone at the restaurant who's in the courtroom today?

A. Yes, I did.

Q. And who was that?

A. *I observed the two subjects over there at the table, Leo Miroff and Jane Powers, sitting at the table.*

Q. Was anyone with them at that time?

A. There was one other subject sitting at the table with them.

Q. Do you know who that individual was?

A. Yes, I do.

Q. And who was that, sir?

A. It was a person named Robert Harder.

Q. Sir, did you know the two individuals that you pointed out in the courtroom at that time, by name?

A. I — I just knew one of them.

Q. And who was that person?

A. *That was Leo Miroff.*

Q. And subsequently after that, did you learn the name of the other individual?

A. Yes, some time later, I did.

Q. And those were the two people seated at the end of the counsel table?

A. Yes, they were the ones sitting with Harder at the table." (Emphasis Added)

Although the court did strike that portion of Officer Erickson's testimony relating to "known thieves, professional thieves," it is doubtful that the prejudice relating to the petitioners could have been wiped out of the minds of the jury. Thus, the Government was able to convey to the jury improperly the impression that these petitioners were known thieves because of the fact that their identities were known to Officer Erickson.

This line of questioning certainly added nothing to the prosecution's case because it did not contribute to the proving of the charges in the indictment, and the surveillance took place subsequent to the dates of the offenses charged in the indictment. Therefore, whatever probative value the evidence could have had was minimal, if any, and the prejudicial effect far outweighed the minimal probative value. Furthermore, the probative value, if any, was merely cumulative of the proof already adduced that the petitioners knew Robert Harder and Harry Aleman.

The proper remedy would have been for the trial judge to grant the petitioners' motion for a mistrial (T.311-312). The petitioners' motion to strike all of Erickson's testimony was also denied (T.272).

In the case of *Odom* v. *United States,* 377 F.2d 853 (5th Cir. 1967) the court held that testimony by a Government witness to the effect that he had seen the defendant come in and out of jail and spoke with him for approximately a year and a half was so prejudicial that an instruction to disregard could not cure the harmful effects.

In *United States* v. *Reed,* 376 F.2d 226 (7th Cir. 1967), the Seventh Circuit held that testimony referring to a "mug shot" of the defendant required reversal.

See also the case of *United States* v. *Clarke,* (3rd Cir. 1965) 343 F.2d 90, wherein the court held that a prompt admonition by the trial judge to the jury to disregard improper evidence was insufficient to eradicate the prejudicial effects of the testimony. In reversing the defendant's conviction the court stated at page 92:

> "The trial judge's view, that his 'prompt and direct' admonition to the jury to disregard the properly stricken challenged statements of Ripa, 'removed any possible prejudice * * * in the jury's mind' brings to mind the immortal lines:
>
> 'The Moving Finger writes; and, having writ,
> Moves on: nor all your Piety nor Wit,
> Shall lure it back to cancel half a Line,
> Nor all your Tears wash out a Word of it.'
>
> Rubaiyat, Stanza 71"

In the case at bar, the reference to the fact that the petitioner Powers had shot her husband, that petitioner Miroff had provided information for other robberies and the implication that the petitioners were known thieves was so prejudicial that the judge's striking of this testimony would have little effect on wiping out the impression that this testimony undoubtedly created in the minds of the jurors to the effect that these petitioners were involved in numerous criminal activities. Such testimony denied them their right to be tried solely for the crimes alleged in the indictment.

In short trials such as this case it is more difficult to eradicate the harmful effects by a mere admonition by the judge. As Mr. Justice Jackson said in *Krulewitch* v. *United States,* 336 U.S. 440, 453; 69 S.Ct. 716, 723 (1949), the naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.

The denial of these motions for a mistrial effectively deprived the petitioners of their right to receive a fair trial pursuant to the Due Process clause of the Fifth Amendment to the Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2174

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEO MIROFF and JANE FRANCES POWERS,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-Cr-690—JOHN F. GRADY, *Judge.*

ARGUED MAY 24, 1979—DECIDED OCTOBER 1, 1979

Before CUMMINGS, *Circuit Judge,* PECK, *Senior Circuit Judge,** and PELL, *Circuit Judge.*

PELL, *Circuit Judge.* In this appeal by Miroff from his conviction of conspiracy to transport stolen property in interstate commerce in violation of 18 U.S.C. § 371 and by Miroff and Powers of their conviction of transporting stolen property in interstate commerce in violation of 18 U.S.C. §§ 2314 and 2(b), the appellants raise five issues. We shall discuss the issues raised and the evidence pertinent thereto in the order presented in the appellants' brief.

* Judge John W. Peck, Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

I

WHETHER THE DISTRICT COURT ERRED IN DENYING THE DEFENDANTS' MOTION TO SUPPRESS EVIDENCE.

On January 11, 1973, furs, jewelry, and cash worth approximately $25,000 were stolen from a home in Indianapolis and shortly thereafter were divided in Illinois among various individuals including Miroff and Powers. Substantial evidence in the record supported the participation of both defendants in the entire operation including the transportation across the state line. On January 19, 1973, Miroff and Powers offered to sell Agent Tucci certain stolen radios which were not a part of the loot of the Indianapolis robbery. On January 26, 1973, federal agents and local police officers went to the residence of one Robert Harder and his wife with arrest warrants for Harder, Miroff, and Powers. At the time, Miroff and Powers were guests in the Harder home temporarily occupying the downstairs bedroom. The Harders kept personal and family belongings in closets and drawers in the downstairs bedroom including clothing, pictures, and papers. The bedroom door had no lock on it and appellants had no key to the house. A week or so prior to the service of the arrest warrants the police had come to the Harder house and the defendants had left the house with the police. The defendants returned to the house whereupon, because of Mrs. Harder being nervous about having two children in the house, her husband told the defendants that they did not want anything in the house that did not belong there and specifically they did not want anything that was stolen. The defendants decided to stay on in the house instead of getting a motel room with the understanding there was nothing in the room that should not have been there. On the evening of the 26th, when Mrs. Harder came upstairs she looked out the window and saw a police car. She came downstairs and reported this to her husband who was with Miroff. She expressed the hope that there was

nothing in the house, and that she did not want any more problems. Miroff replied that there was nothing in the house that should not be there.

On the arrival of the officers at the house on the evening of the 26th, Harder admitted the officers and gave permission for the officers to search the bedroom which had been occupied by the defendants. At one point in the testimony at the suppression hearing, one of the officers stated that Harder had told the officers that "that whatever was in the bedroom belonged to Mr. Miroff." This was not in fact the case, as indicated hereinbefore, although it does appear that all of the possessions of the defendants were in fact in the one bedroom. The officers searched the room and found and seized shopping bags containing radios and electric shavers, a garment bag containing jewelry, approximately $1000 in $20 bills, two guns, and plastic garbage bags containing furs. They also found two Indiana license plates on the floor of the closet. Finally, on the nightstand adjacent to the bed the officers found an address book and some papers listing each item of jewelry found in the garment bag with dollar amounts next to each item. The district court refused to suppress the various items seized during the search.

We have little trouble with the present issue insofar as the consent to search the room was concerned. Permission to search was obtained from a third party who possessed at the very least common authority over the bedroom sought to be inspected. *United States* v. *Matlock*, 415 U.S. 164, 171 (1974). The defendants argue, however, that this consent, even though phrased as "full permission to search his residence" gave Harder no authority to consent to a search of the personal belongings of the defendants. Under the particular facts of this case, however, because the defendants had assured the Harders there was nothing stolen in the room and nothing there that did not belong there, the defendants must be regarded as having assumed the risk that one with whom

they shared the common area might properly permit that common area to be searched, particularly when the sharer was the dominant or controlling party in the general premises. *See United States* v. *Cook,* 530 F.2d 145 (7th Cir. 1976), *cert. denied,* 426 U.S. 909. The present case is stronger for the assumption of the risk than was *Cook* in view of the understanding that the defendants had with the Harders that there was nothing improper in the room. In effect, their staying on at the Harder house was on the express condition that they had nothing of a stolen nature in the room that they were occupying as guests. As the Supreme Court indicated in *Frazier* v. *Cupp,* 394 U.S. 731, 740 (1969), the courts should not engage in metaphysical subleties with regard to such a consent. We think that language is applicable here where it could be fairly said that the defendants had knowingly and deliberately assumed the risk that Harder would allow someone else to look at all of the property in the room.

In their reply brief, the defendants rely strongly on *United States* v. *Block,* 590 F.2d 535, 541 (4th Cir. 1978) and *United States* v. *Isom,* 588 F.2d 858, 861 (2d Cir. 1978). We note, however, that in both cases the court emphasized the importance of the justifiable expectation of privacy. In the present case, the defendants by their assurances to Harder there were no stolen goods in the bedroom and that there was nothing there which should not have been there, placed Harder in a position of granting consent to a search of the entire room and its contents without any basis for his thinking that the defendants were asserting an expectation of privacy.

The defendants also argue that the seizure of these items was unreasonable as being made without probable cause because the arrest warrants were to be served in connection with the possession of stolen radios and at the time the officers were given permission to search the house they were not aware that the furs, jewelry, and cash they subsequently found were stolen. Because we regard probable cause as being determined by everyday factual and practical considerations on which reasonable

and prudent men act, *Brinegar* v. *United States,* 338 U.S. 160 (1949), once the officers found the radios and electric shavers in the shopping bags, jewelry, almost $1000 in $20 bills and two guns in a garment bag, furs with someone else's name sewed inside them in plastic garbage bags, and the handwritten list of jewelry, the officers had adequate probable cause to seize the items found in the bedrooms even though they did not know at the time that the items were stolen. We do not find any support for the appellants' position on the facts of this particular case in *United States* v. *Wilson,* 536 F.2d 883 (9th Cir. 1976), *cert. denied,* 429 U.S. 982, or *Corngold* v. *United States,* 367 F.2d 1 (9th Cir. 1966).

We are satisfied that the evidence seized bore a reasonable relation to the purpore of the search which was conducted in connection with an ongoing investigation of criminal dealing in stolen articles.

In sum, the situation in this case is not, in our opinion, the type to require us to invoke the exclusionary rule.

II

WHETHER THE COURT ERRED IN PERMITTING EVIDENCE RELATING TO CRIMINAL ACTIVITY NOT CHARGED IN THE INDICTMENT.

Testimony was received in the trial, over objection, regarding the prior conversations with Agent Tucci about stolen radios and with regard to the officers going to the Harder residence to make arrests in connection with those radios. This evidence was received for the limited purpose of the jury determining what bearing, if any, it had on the knowledge and the intent of the defendants insofar as the items taken from the Indianapolis house were concerned.

The defendants concede that it is proper to establish criminal intent or knowledge by evidence of other criminal activity, but relying upon *United States* v. *Miller,*

508 F.2d 444 (7th Cir. 1974), they assert that this criminal activity was inadmissible to establish criminal intent or knowledge unless and until the defendants had affirmatively contested their intent and knowledge that the articles which were the subject of the indictment were stolen.

In the present case it seems clear to us as a preliminary matter that the evidence in question was similar to the offense charged and was close enough in time to be relevant. *United States* v. *Fierson,* 419 F.2d 1020, 1022-23 (7th Cir. 1969). While it is true that the instant indictment charged violations concerning transporting stolen property in interstate commerce and that the radio matter presumably more directly concerned the violation of the theft statutes of Illinois, both situations involved the handling and disposition of stolen property, one element only of the federal case being the matter of the transportation across state lines.

The appellants argue, however, that something more is required than similarity and time-proximity and that *Fierson* holds that such evidence should not be admitted when the accused has not put wilfulness or intent in issue. They argue that the element of intent, or knowledge, was merely a formal issue in their trial. This court in the later case of *United States* v. *Weidman,* 572 F.2d 1199, 1202 (7th Cir. 1978), *cert. denied,* 439 U.S. 821, was confronted with a similar argument under *Fierson,* the appellant there emphasizing that his defense was not based on a claim of accident or mistake but on the broad denial that he had committed the charged acts. He insisted, therefore, that there was in fact no contest as to his state of mind. The court rejected this contention, pointing out that the Government had a substantial need to evidence Weidman's intent even though he had not "sharpened" the issue by claiming accident or mistake. There the Government had the burden of proving beyond a reasonable doubt the element of specific intent to defraud. In the case before us the Government has a burden

of proving beyond a reasonable doubt the essential element in the crime of transporting stolen property in interstate commerce (18 U.S.C. § 2314) of knowledge on the part of the defendant that the property was stolen. Under Rule 404(b), Federal Rules of Evidence, evidence of other crimes, wrongs, or acts are specifically admissible for the proof of knowledge.

We cannot say that evidence such as that challenged here which appears to us to have a direct bearing on the knowledge of the defendants in dealing with stolen goods should have been excluded from evidence. *See United States* v. *Parnell,* 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied,* 98 S.Ct. 852. We recognize that on this point this is a close case and that the Government did offer substantial evidence, both direct and circumstantial, from which knowledge might be inferred. Nevertheless, evidence of specific knowledge in the transactional processing of stolen goods does appear to have direct bearing upon the crime charged and therefore, in the discretion of the trial court, was properly admitted.

III

WHETHER THE COURT ERRED IN ADMITTING TESTIMONY RELATING TO GUNS FOUND IN THE BEDROOM.

During the course of the direct testimony of one of the officers he was asked what had been seized in the bedroom. In response to a continuing line of similar questions he set forth the various items. He was asked if he had found anything else, to which he replied, "yes," and when he was asked what that was he answered that he had found two guns. At this point defense counsel simply stated, "Objection," but did not move to strike the evidence. The court overruled the objection. The witness then concluded his testimony, reciting that there had been currency and jewelry and some papers seized. At the conclusion of the day's evidence the defense moved for a mistrial on the basis of the guns and certain other

matters. During the colloquy concerning this motion it appeared that defense counsel through discovery had been advised of everything that had been found in the bedroom including the two guns and had also been advised through discovery that there was no indication as to the ownership of the guns and that they were not the same make or identity as the two guns about which the witness Almeida had testified.[1] We agree with the Government that the defense objection and motion for mistrial were on the belated side. A motion could have been filed under the circumstance of this case in advance of trial if counsel felt that the disclosure of the presence of the guns would be as prejudicial as it is now claimed it was. The court denied the motion for mistrial and pointed out that the defendants had been charged in the conspiracy count with conspiring to commit a robbery and induce fear in and commit violence upon their intended victims by the use of firearms. The court thought that the possession of the handguns was a circumstance which was consistent with that kind of activity and he pointed out that while the possession did not prove the point it was a relevant circumstance that the jury was entitled to consider along with all other evidence.

We are not unmindful of cases where there was no relevance to the showing of the possession of a gun or where the likelihood existed that the prejudice outweighed the relevancy, where it was held the admission of the evidence was erroneous. *Moody* v. *United States,* 376 F.2d 525 (9th Cir. 1967); *United States* v. *Warledo,* 557 F.2d 721 (10th Cir. 1977).

On the other hand, other cases have held that there was sufficient relevance for the testimony to be admitted. *Moore* v. *Illinois,* 408 U.S. 786 (1972); *United States* v. *Stone,* 471 F.2d 170 (7th Cir. 1972), *cert. denied,* 411 U.S. 931 (1973); *United States* v. *Wiener,* 534 F.2d 15 (2d Cir. 1976), *cert. denied,* 429 U.S. 820.

[1] Almeida was an unindicted co-conspirator, a principal participant in the Indianapolis robbery, and a principal Government witness.

While we do not feel that we are in a position to observe as the Second Circuit did in *Wiener* with regard to narcotics dealers that possessors of stolen goods transported in interstate commerce keep firearms on their premises as tools of the trade, *id.* at 18, we nevertheless find, particularly in view of the charge in Count I of the indictment, that there was relevance. Further we do not from the record in this case regard the incidental testimony as to the guns as creating such prejudice as to require reversal.

We also are mindful as being applicable both to the present point and some other matters subsequently discussed that a trial judge is afforded broad discretion in determining whether the probative value of the evidence being offered is outweighed by the possible prejudice of the evidence. *United States* v. *Juarez,* 561 F.2d 65 (7th Cir. 1977); *United States* v. *Krohn,* 560 F.2d 293 (7th Cir. 1977), *cert. denied,* 434 U.S. 895.

IV

WHETHER THE COURT ERRED IN DENYING OTHER DEFENSE MOTIONS FOR A MISTRIAL.

On several occasions during the course of the trial, Government witnesses testified to matters which were stricken by the court on motion of the defense. The defendants contend, however, that these instances, either singularly or cumulatively, created sufficient prejudice that the mere sustaining of the objection and striking of the answer was not sufficient to wipe out the harmful effects of the improper testimony and that a mistrial should have been granted.

We are not unmindful of the frequency with which the strong words of Mr. Justice Jackson in *Krulewitch* v. *United States,* 336 U.S. 440 (1949) are quoted to the ef-

fect that all practicing lawyers know it to be an unmitigated fiction that prejudicial effects can be overcome by instructions to the jury. While from our own experience in the practice of law and from observing records of trials we might feel that this characterization is on the overly-strong side and scarcely gives full credit to the fact that many, if not most, jurors conscientiously attempt to follow the court's instructions, we will nevertheless look at the instances in question here to determine whether they are of a sufficient prejudice potential to require reversal. We do not so regard them.

Two of the incidents involved the witness Almeida. On one occasion he testified that the unindicted co-conspirator Foresta knew Miroff and in a conversation with Foresta the witness was told that Miroff used to give him tips on scores to make and on another occasion Miroff had spoken with the witness and Almeida was told that he could feel free to talk in front of Powers "that she was a stand-up broad and that she shot her husband, something like that." The third incident involved a Chicago detective who in setting forth his duties assigned to his division stated that his responsibility was "with known thieves, professional thieves." The trial judge here each time took prompt and decisive action to negate potential prejudice. *United States* v. *Harris,* 558 F.2d 366 (7th Cir. 1977); *United States* v. *Zarattini,* 552 F.2d 753 (7th Cir. 1977), *cert. denied,* 431 U.S. 942; *United States* v. *Lawson,* 507 F.2d 433 (7th Cir. 1974), *cert. denied,* 420 U.S. 1004.

From our examination of the record, we find ourselves unpersuaded that an unfair trial resulted from these three instances in testimony contained in a transcript of more than 350 pages, recognizing that "instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." *Bruton* v. *United States,* 391 U.S. 123, 135 (1968). We have no reason for thinking from this record that the Government deliberately sought these

remarks[2] as a part of their case which was a strong case of guilt without the items in question. While their uttering before the jury may have prevented this from being a perfect trial, a perfect trial is not required but only a fair trial and in view of the prompt and decisive action of the district court we do not believe that the defendants were denied a fair trial.

We also note, in addition to the action taken by the judge at the time the instances came into the trial, that early in its charge the court advised the jury that it had been the court's duty to rule on the inadmissibility of the evidence and the jury should not be concerned with the reason for this rule and that it "should disregard . . . testimony which the Court has refused or stricken, and you should also disregard any remarks or comments which the Court struck." Finally as some indication that the testimonial remarks were not of the overpowering prejudice ascribed to them by the defendants, we note that Powers was acquitted on the conspiracy count.

V

WHETHER THE COURT ERRED IN PERMITTING THE PROSECUTION TO PROVE ALL OF THE DETAILS OF THE HOME INVASION.

The defendants concede that some of the evidence as to the circumstances of the robbery in the Indianapolis home might have been necessary in the Government's case to establish the fact that the jewelry, cash, and furs were stolen, "it should have been done in a manner that was not so prejudicial to the defendants." This complaint in essence is that there was no necessity "of going through all of the minute details of circumstances sur-

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[2] We note that the Government attorney advised the court early in the trial with regard to Almeida that he had spoken to Almeida with a deputy marshall present and advised him that he should be very careful and refrain from answering questions that would involve information concerning Miss Powers and her husband about marijuana.

rounding the robbery." We again initially note the part of the indictment under the conspiracy count referring to the robbery by means of deceit and misrepresentation and that the conspirators would induce fear in and commit violence upon their intended victims by the use of firearms. Nevertheless, the court during the opening statement of the Government to the jury instructed the jury that if there was any evidence about what any of the defendants did at the Indianapolis home it would be admitted solely on the question of their knowledge as to the status of the property as to whether it was stolen or was not. The court also stated that it wanted it make very clear that this was not a robbery case, it was not a burglary case, but is was a case involving the alleged interstate transportation of stolen property.

The defendants particularly point out the details contained in the testimony of Almeida and the maid at the Indianapolis residence. With regard to Almeida he, of course, was a participant who became one of the principal Government witnesses with regard to the details of the crime which put the property in question into the status of stolen property. The Government by going into detail on his testimony plainly demonstrated that he was giving testimony as a person who himself had participated in the crime of violence and the testimony therefore would seem to be within the realm of admissible evidence in the court's discretion, to show that Almeida was intimately knowledgeable about the details leading up to the property reaching the status of being stolen before it was transported in interstate commerce. In any event, the defendants have directed the court's attention to eleven pages of the transcript with regard to Almeida. At page 45, defense objected on the ground of immaterial hearsay upon which the court admonished the Government counsel that not every last detail of the entry need be gone into, that the tail should not wag the dog, that they were entitled to prove it was stolen property but they should not try a robbery case. The Government stated it was simply talking about the entry into the house. The

next objection appeared at page 55 on the ground of immateriality as to a conversation which the court overruled. At page 54, there was one further and final objection appearing in this segment of the transcript, again on the grounds of immateriality, in which the witness Almeida was describing the guns that were used. From our reading of this portion of the transcript we do not regard the testimony as that which would arouse prejudice on the part of the hearer.

With regard to the maid's testimony, the Government asserts that because of the defense attempt to discredit the testimony of the key witness Almeida, the Government in response put on Mrs. Burgin, the maid, to corroborate essential parts of his testimony. Under the circumstances of corroborating the testimony, we do not regard it as so prejudicial as to outweigh its probative value. *United States* v. *Chapin,* 515 F.2d 1274 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1015.

In the some 17 or 18 pages of the Burgin testimony to which the defense directs us, while we have spoken of violence, the testimony basically deals with the description of the premises and the incident of deception whereby Foresta and Almeida gained entry into the house and the fact they did tie her up, none of which is of the prejudicial nature which was involved in *United States* v. *Ostrowsky,* 501 F.2d 318 (7th Cir. 1974) in which this court held that the trial court had abused its discretion by permitting proof of the gruesome and unnecessary details of the victim's murder.

In sum, we think that the district court judge conducted a fair trial, and that the judgments of conviction should be affirmed for the reasons set out in this order.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 5, 1979

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOHN W. PECK, *Senior Circuit Judge*•
Hon. WILBUR F. PELL, JR., *Circuit Judge*

No. 78-2174

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LEO MIROFF and JANE FRANCES POWERS,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-CR-690
JOHN F. GRADY, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendants-appellants Leo Miroff and Jane Frances Powers, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

• Judge John W. Peck, Senior Circuit Judge for the Sixth Circuit is sitting by designation.

Supreme Court, U. S.
FILED
MAR 4 1980
MICHAEL RODAK, JR., CLERK

No. 79-1047

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEO MIROFF and JANE FRANCES POWERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1047

LEO MIROFF and JANE FRANCES POWERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 606 F.2d 777.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1979. A petition for rehearing was denied on December 5, 1979. The petition for a writ

of certiorari was filed on January 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, the warrantless search of a garment bag and a plastic garbage bag violated petitioners' Fourth Amendment rights.

2. Whether evidence that two guns had been found in petitioners' room was improperly admitted.

3. Whether extrinsic-crime evidence was improperly admitted.

4. Whether certain testimony was so prejudicial as to require reversal, even though it was stricken from the record.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of transporting stolen property in interstate commerce, in violation of 18 U.S.C. 2314 and 2(b). In addition, petitioner Miroff was convicted of conspiring to commit that offense, in violation of 18 U.S.C. 371.[1] Petitioner Miroff was sentenced to one year's imprisonment to be followed by three years' probation. Petitioner Powers was sentenced to six months' imprisonment to be followed by four and one-half years' probation. The court of appeals affirmed (Pet. App. 1a-13a).

[1] Petitioner Powers was acquitted on the conspiracy count.

1. The evidence showed that at a meeting on January 8, 1973, in Melrose Park, Illinois, Harry Aleman, Louis Almeida, and Leonard Foresta [2] discussed plans for the robbery of the Indianapolis, Indiana home of Dr. Robert Messinger. Aleman stated that he had received a "tip" about the house from petitioner Miroff and that he wanted Almeida and Foresta to rob it (Tr. 13-14, 19-24; Pet. App. 2a).

The following evening Almeida and Foresta met with Miroff and his girlfriend, petitioner Powers, at Miroff's apartment in Indianapolis, and that evening they discussed the robbery (Tr. 34-38). Miroff then drove them to the Messinger house, stating that he and Powers had devoted a lot of time and effort to obtaining information about the house (Tr. 38-39). The next day, Miroff and Almeida went to a shopping plaza where Almeida stole an Indiana license plate (Tr. 40). The following morning Almeida and Foresta stole a second Indiana license plate and put it on Foresta's car (Tr. 41-42). When they returned to Miroff's apartment, Miroff and Powers told them how to gain entry to the Messinger house, and they dis-

[2] Harry Aleman and Leonard Foresta were convicted in a separate trial of participation in the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)), conspiracy to commit that offense (18 U.S.C. 1962(d)), and interstate transportation of stolen property (18 U.S.C. 2314), growing out of the robbery in Indiana that formed the basis of the conviction in the present case and two other robberies. Their petition for a writ of certiorari raising issues unrelated to the present petition is now pending. *Aleman and Foresta* v. *United States*, No. 79-1009.

cussed where they would meet after the robbery (Tr. 42-43).

The four then drove in two cars to a shopping center approximately one mile from the Messinger house. From there, Almeida and Foresta went to the house, where Foresta went to the front door and briefly talked to the maid (Tr. 43-46, 154-156). They then returned to the shopping center where Miroff and Powers were waiting and told them that the maid was the only person in the house (Tr. 46).

At approximately 12:30 a.m., Almeida and Foresta returned to the house and gained entry by posing as CIA agents. Brandishing pistols, they tied the maid up and seized furs, jewelry, and cash worth approximately $25,000 (Tr. 46-49, 54, 56, 156-165; Pet. App. 2a). The four spent the night at Miroff's apartment and left the next morning for Aleman's house in Melrose Park. There, arrangements were made for dividing the proceeds of the robbery (Tr. 58, 60, 68, 76).

2. Prior to trial, petitioners moved to suppress the items stolen from the Messinger house and other evidence on Fourth Amendment grounds. The evidence adduced at the suppression hearing (see Pet. App. 2a-5a) showed that on January 19, 1973, petitioners offered to sell a federal undercover agent certain stolen radios that were not part of the loot of the Indianapolis robbery. On January 26, federal agents and local police officers went to the residence of Robert Harder and his wife to arrest Harder, Miroff, and Powers for possession of the radios. At the time, Miroff and Powers were guests in the Harder house,

temporarily occupying the downstairs bedroom. The Harders kept personal belongings in closets and drawers in the bedroom, including clothing, pictures, and papers. The bedroom door had no lock on it, and petitioners had no key to the house.[3]

Upon the officers' arrival at the house, Harder admitted them and gave them permission to search the bedroom occupied by petitioners. At one point in the testimony at the hearing, one of the officers stated that Harder had told them that "[w]hatever was in the bedroom belonged to Mr. Miroff." This was obviously not the case, because the Harders' own clothing was found in the bedroom closet; however, it did appear that all of petitioners' possessions were located in the bedroom. The officers searched the room and found several shopping bags containing radios and electric-shavers. Inside the closet, they found a garment bag containing jewelry, approximately $1,000, and two guns. On the floor of the closet they found a plastic garbage bag containing furs, and two Indiana license plates.[4] Finally, on the night stand adjacent to the bed, the officers found an address book and some papers listing each item of jewelry found in the gar-

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[3] About a week prior to the service of the arrest warrants, the police had come to the Harder home, and petitioners had left with them. When petitioners returned to the house, Harder told them that he and his wife did not want anything in the house that had been stolen. Petitioners stayed on with the understanding there was no stolen property in the room (Pet. App. 2a).

[4] The garbage bag was found untied (July 18, 1978 Tr. 26).

ment bag and its estimated worth (see July 18, 1978 Tr. 24-30, 45-49; Pet. App. 3a).

ARGUMENT

1. Petitioners appear to concede (Pet. 8, 12) that Harder could properly consent to a search of the bedroom,[5] but they contend (Pet. 6-12) that Harder had no authority to consent to the warrantless searches of the garment bag and the untied plastic bag and that these searches were therefore invalid. This claim is unfounded. Petitioners could not, in the circumstances of this case, have entertained a reasonable expectation of privacy in the contents of the bags sufficient to implicate their Fourth Amendment rights. Indeed, we doubt that a garbage bag—especially an untied one—is subject to a reasonable expectation of privacy in any circumstance. See *United States* v. *Neumann*, 585 F.2d 355, 360-361 (8th Cir. 1978); *United States* v. *Block*, 590 F.2d 535, 541 n.8 (4th Cir. 1978); compare *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), slip op. 11 n.13.

Moreover, the evidence indicates that the garment bag was hung in the bedroom closet among the Harders' own clothes when the officers found it, and the garbage bag was on the closet floor. It was

[5] Harder's right to consent to the search of the bedroom and closet is apparent because, at the very least, he possessed joint authority over those areas. See *United States* v. *Matlock*, 415 U.S. 164, 171 & n.7 (1974); *United States* v. *Block*, 590 F.2d 535, 539-540 (4th Cir. 1978); *United States* v. *Richardson*, 562 F.2d 476, 479-480 (7th Cir. 1977).

not apparent that these bags—unlike, for example, the suitcase on the bedroom floor (July 18, 1978 Tr. 44)—belonged to petitioners. Having thus neglected adequately to separate their property from that of the Harders, petitioners could not reasonably have expected that, in the event the Harders consented to a search of the closet, the bags would remain unexamined. In making consensual searches, the police are not required to ascertain the ownership or custody of every article or space in the premises searched. *United States* v. *Robinson*, 479 F.2d 300, 303 (7th Cir. 1973); see *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969).

Moreover, petitioners knew that the Harders suspected that they were concealing stolen property in the room; indeed, the Harders had specifically warned them not to do so. Their continued presence in the house, as the court of appeals observed (Pet. App. 4a), was contingent on their keeping no stolen property there. Accordingly, petitioners could have been under no illusion that the contents of the bags were secure from any attempt by the Harders to determine if they were abiding by the conditions of their stay. Having made no attempt to protect the bags from the scrutiny of the Harders, petitioners assumed the risk that the Harders might allow someone else to look at items in the room, *Frazier* v. *Cupp*, 394 U.S. at 740; accordingly, they possessed no reasonable expectation of privacy with respect to them. It would have required nothing less than a locked container to permit such an expectation in these circumstances. See

Holzhey v. *United States*, 223 F.2d 823 (5th Cir. 1955).

The cases upon which petitioners rely do not aid their cause. The suitcase in *United States* v. *Wilson*, 536 F.2d 883 (9th Cir. 1976), and the footlocker in *United States* v. *Block*, *supra*, were not intermingled with the property of the person consenting to the search, and it was obvious the property did not belong to that person. Moreover, in neither case did the defendant entertain a diminished privacy expectation based on the known suspicions of others with whom he shared the premises. Indeed, the footlocker in *Block* was secured and had to be forced open by the officers. In *United States* v. *Isom*, 588 F.2d 858 (2d Cir. 1978), the court stated that as a general rule "[g]uests have a justifiable expectation * * * that the contents of *locked* articles that they bring to the host's premises will remain private" (588 F.2d at 861; emphasis added). Petitioners do not contend that the bags in this case were comparably secured.[6] In any event, the court upheld the search of the defendant's locked box in *Isom* because the police had no

[6] Petitioners also contend (Pet. 12) that the police lacked probable cause to seize the contents of the bags because they had no knowledge that any of the items had been stolen. But, as the court of appeals concluded (Pet. App. 5a), "once the officers found the radios and electric shavers in the shopping bags, jewelry, almost $1000 in $20 bills and two guns in a garment bag, furs with someone else's name sewed inside them in plastic garbage bags, and the handwritten list of jewelry, the officers had adequate probable cause to seize the items."

basis for believing the consenter's authority did not extend to it.

2. During his direct testimony, one of the police officers was asked what had been seized in the Harder bedroom. Among the things he listed were the two guns found in the garment bag. Petitioners objected, and the court overruled the objection (Tr. 191-193). Petitioners contend (Pet. 20-24) that this ruling was error.

Rule 403, Fed. R. Evid., commits to the trial court's discretion the weighing of the probative value and possible prejudicial impact of proffered evidence. Here, as the courts below concluded (Pet. App. 8a-9a), the testimony concerning the guns was probative. Petitioners were charged in the conspiracy count with, among other things, conspiring to commit a robbery and to "induce fear in and commit violence upon their intended victims by the use of firearms" (July 28, 1978 Tr. 53). Since the possession of handguns is consistent with this kind of activity, the jury was entitled to consider the evidence of the guns—especially in view of the fact that the weapons were found in the garment bag along with the stolen property. See *Moore* v. *Illinois*, 408 U.S. 786 (1972); *United States* v. *Stone*, 471 F.2d 170, 172-173 (7th Cir. 1972), cert. denied, 411 U.S. 931 (1973); *United States* v. *Wiener*, 534 F.2d 15, 17-18 (2d Cir.), cert. denied, 429 U.S. 820 (1976).

Moreover, the officer's testimony did not in any way emphasize the guns; he simply mentioned that guns were among the items found in the garment bag. This "incidental testimony", as the court of appeals

characterized it (Pet. App. 9a), was plainly not so prejudicial as to require reversal, particularly in view of the strong evidence of petitioners' guilt.[7]

3. Over petitioners' objection, a federal agent was permitted to testify that on January 19, 1973—eight days after the robbery of the Messinger house—petitioners offered to sell him stolen radios. The agent also testified that when he and other law enforcement agents went to the Harder residence on January 26, they intended to arrest petitioners for possession of the stolen radios seen at the January 19th meeting (Tr. 247-250). The district court instructed the jury (Tr. 245-246) that this testimony was being received for the sole purpose of establishing that petitioners knew the items they had transported in interstate commerce were stolen. Although they concede that criminal intent or knowledge may be proven by evidence of other crimes under Fed. R. Evid. 404(b), petitioners contend that the agent's testimony was

[7] The cases upon which petitioners rely (Pet. 21-23) are inapposite. In *Moody* v. *United States*, 376 F.2d 525, 530-532 (9th Cir. 1967), *United States* v. *Warledo*, 557 F.2d 721 (10th Cir. 1977), and *United States* v. *Reid*, 410 F.2d 1223 (7th Cir. 1969), the evidence of the weapon was extensive and emphasized; indeed, in *Moody* and *Warledo*, the gun itself was admitted into evidence. In *United States* v. *Robinson*, 544 F.2d 611, 619-620 (2d Cir. 1976), a panel of the court of appeals concluded that the admission of testimony that the defendant possessed a gun at the time of his arrest for bank robbery was reversible error because, unlike here, the government's case was extremely weak. In any event, the en banc court reached the opposite conclusion in that case and affirmed the conviction. 560 F.2d 507 (2d Cir. 1977), cert. denied, 435 U.S. 905 (1978).

inadmissible because petitioners had not contested their knowledge that the articles were stolen (Pet. 13-16) and because the attempted sale of the radios occurred subsequent to the crimes charged in this case (Pet. 16-20). These claims are without merit.

It is an essential element of the crime of transporting stolen property in interstate commerce that the defendant knew the property was stolen. See *United States* v. *Solomon*, 422 F.2d 1110, 1112 (7th Cir.), cert. denied, 399 U.S. 911 (1970); *Pauldino* v. *United States*, 379 F.2d 170, 172 (10th Cir. 1967). Petitioners' failure to contest their guilty knowledge did not relieve the government of its burden of proving this element of the offense beyond a reasonable doubt.[8] Because the government thus had a legitimate need for the extrinsic-crime evidence (see *United States* v. *Weidman*, 572 F.2d 1199, 1202 (7th Cir.), cert. denied, 439 U.S. 821 (1978)), the district court did not abuse its discretion in admitting it. This is especially clear here since the court carefully apprised the jury of the limited purpose for which the evidence could be considered,[9] and the evidence of petitioners' guilt (see pages 3-4, *supra*) was overwhelming.[10]

[8] The Advisory Committee Notes to Fed. R. Evid. 401 indicate that the rules contain no "requirement that evidence is admissible only if directed to matters in dispute."

[9] This cautionary instruction was repeated in the court's final charge (July 28, 1978 Tr. 50).

[10] This case is unlike those relied upon by petitioners. In *United States* v. *Adams*, 385 F.2d 548 (2d Cir. 1967), the conviction was reversed on other grounds, and the court merely discussed the question of admissibility of extrinsic-

Nor is there merit to petitioners' claim that the extrinsic-offense evidence lacked relevance merely because it was committed after, rather than before, the charged offense.[11] The relevancy of extrinsic-crime evidence is to be judged under the standard set forth in Fed. R. Evid. 401, which provides that evidence is relevant when it has "any tendency to make the

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crime evidence consisting of conversations concerning a possible drug transaction that never took place. In *United States* v. *Broadway*, 477 F.2d 991 (5th Cir. 1973), the court held that the extrinsic offense was inadmissible not because the element it was introduced to prove was uncontested—in fact, it was contested—but because the two offenses were not sufficiently similar. To the extent petitioners rely on the Seventh Circuit's prior decision in *United States* v. *Fierson*, 419 F.2d 1020 (1969), they suggest a conflict among different panels of the same circuit. Such a conflict does not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[11] For this position petitioners rely principally on *United States* v. *Boyd*, 595 F.2d 120 (3d Cir. 1978). There, the court, in ruling that evidence of a subsequent crime had been improperly admitted under Rule 404(b), stated that "[t]he logic of showing prior intent or knowledge by proof of subsequent activity escapes us." 595 F.2d at 126. This view finds no support in the Rules of Evidence or the cases construing them, and is in direct conflict with prior decisions of the Third Circuit. See *United States* v. *Bey*, 437 F.2d 188, 191 (3d Cir. 1971); *United States* v. *Laurelli*, 293 F.2d 830, 832 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962). Indeed, since the decision in *Boyd*, the Third Circuit has upheld the admission of subsequent crime evidence under Fed. R. Evid. 404(b). See *United States* v. *Milhollan*, 599 F.2d 518, 524 (3d Cir. 1979). In the other cases cited by petitioners evidence of the extrinsic crime was held inadmissible for reasons having nothing to do with the fact that it occurred after the charged offense.

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, the testimony that petitioners were dealing in radios they knew to be stolen only eight days after transporting other stolen property in interstate commerce surely tended to show that they also knew that property was stolen. No more was required to support the trial court's determination that it was relevant.

4. On several occasions during the trial, a government witness gave testimony that was stricken by the court on motion of the defense. Two of the incidents involved the witness Almeida, who was one of the participants in the robbery. On one occasion, he testified that Foresta told him that petitioner Miroff "used to give him tips on scores to make" (Tr. 31). On another occasion, Almeida testified that Miroff told him that petitioner Powers "was a stand-up broad and that she shot her husband, something like that" (Tr. 35-36). In a third incident, a detective, in setting forth his duties, testified that his responsibility was "with the known thieves, professional thieves" (Tr. 266). Petitioners contend (Pet. 24-29) that this testimony was so prejudicial as to compel reversal of their convictions.

In view of the district court's prompt and decisive action to negate prejudice by striking the answers, reversal is not required. As this Court stated in *Bruton* v. *United States*, 391 U.S. 123, 135 (1968), "[n]ot every admission of inadmissible * * * evidence can be considered to be reversible error unavoidable

through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." Here, in addition to its immediate action in striking the testimony, the court advised the jury early in its final charge that the jury should "disregard * * * testimony which the Court has refused or stricken" (July 28, 1978 Tr. 44). Moreover, there is no indication that the government deliberately elicited the answers. In any event, this case was plainly not so close that the offending testimony could have been a decisive factor.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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[12] In *Odom* v. *United States*, 377 F.2d 853, 859 (5th Cir. 1967), and *United States* v. *Clarke*, 343 F.2d 90 (3d Cir. 1965), the courts acknowledged that, in general, an erroneous admission of evidence is cured by instructing the jury to disregard it, especially where, as here, guilt is clear. In *United States* v. *Reed*, 376 F.2d 226 (7th Cir. 1967), the court, while sustaining defendant's objection to the offending testimony, apparently neglected to instruct the jury to disregard it (*id.* at 228).

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